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SUMMARY RECORD OF THE 1405th MEETING

Held at Headquarters, New York,
on Friday, 31 March 1995, at 10 a.m.

Chairman: Mr. AGUILAR

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The meeting was called to order at 10.30 a.m.

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT (continued)

Initial report of the United States of America (continued) (CCPR/R/C/81/Add.4; HRI/Corr.1/Add.49)

1. At the invitation of the Chairman, Mr. Aleinikoff, Mr. Di Gregory, Mr. Harper, Ms. Harris, Ms. Homer, Mr. Patrick, and Mr. Shattuck (United States of America) took places at the Committee table.

2. Mr. SHATTUCK (United States of America) said that the depth of the United States commitment to civil liberties was demonstrated by its long and often painful struggle fully to achieve them. In such areas as freedom of speech, freedom of the press, freedom of association and freedom of religion, its system of laws and practices allowed greater freedom than the Covenant required. Its framework of tribal self-governance and self-determination of Native Americans was stronger than similar arrangements in other States, and its network of non-governmental organizations was the most extensive of any nation in the world.

3. Many members had asked whether the United States would immediately propose any further legislation to implement the Covenant. In the initial report, the conclusion was reached that the Constitution and federal law were in compliance with the obligations assumed in ratifying the Covenant; therefore, implementing legislation would not be enacted. If such a need was identified during the course of implementation, however, consideration would certainly be given to the adoption of such legislation. Concern had also been voiced that United States citizens had received no additional benefit from ratification of the Covenant, yet ratification was the beginning, not the end, of a process of progressive implementation of the benefits of human rights treaties into the system of civil and political rights. Ratification had already resulted in a comprehensive evaluation of United States legal protections of civil and political rights and had focused greater public attention on the review process. Such obstacles to progress in advancing civil and political rights as racism and gender discrimination, intolerance and economic distress remained, yet the system was founded on the principles of freedom of expression and equal protection, structured to encourage positive change resulting from open and informed debate under the rule of law. The United States wholeheartedly agreed with the principle that States must actively guarantee human rights, as illustrated by its ratification of the Covenant and other human rights treaties and the constitutional framework which provided protection for civil and political rights.

4. Several specific actions had been taken or were planned with regard to implementation of the Covenant. Prior to ratification, a comprehensive analysis of United States law in relation to the Covenant's provisions had been conducted, which had been submitted to the Congress and reviewed by its members during the debate on ratification. The text of the Covenant had been published in the Federal Register, the official daily bulletin of the Government.

Analyses of the Covenant had been provided to the attorneys-general of the states for distribution to state officials concerned with civil and political rights. Government officials had discussed the implications of ratification in panels organized by non-governmental organizations, legal experts and academic institutions. The Government agreed with the Committee's recommendation that it should engage in regular consultation with state authorities to discuss state involvement in implementation. It would consider establishing an inter-agency working group at the federal level to centralize implementation activities.

5. Many judges were well informed regarding the provisions of the Covenant and many more would become educated through invocation of the Covenant by litigants. He agreed with Mr. Lallah's recommendation that the Government should make use of the Federal Judicial Center to increase awareness of the Covenant, and Mrs. Evatt's suggestion that state judicial centres should be used in a similar fashion. The report had been distributed to state attorneys-general, the various state bar associations, the many offices and agencies responsible for civil and political rights, the academic community and to interested non-governmental organizations. The document was also available electronically through the Internet.

6. In reply to Mr. Pocar and Mr. Mavrommatis, there would be a continued effort to ensure that new legislation would be in conformity with the Covenant. In addition, the Government would conduct a review of how its responsibilities under the Covenant were being implemented and the need for maintaining its reservations, understandings and declarations with the aim of achieving full implementation of the Covenant within the framework of representative democracy. Public information efforts would be broadened and efforts would be made to expand the knowledge of the Covenant and its relationship to United States law at the state level and among the judiciary. Note had been taken of recommendations from Committee members regarding increased involvement of the states in the review process and in the preparation of subsequent reports.

7. Mr. HARPER (United States of America) said, with respect to the reservations, understandings and declarations of the United States, that several Committee members had expressed concern over the decision to declare the Covenant non-self-executing. That declaration was not a reservation and did not limit international obligations under the Covenant. It only meant that the Covenant could not, in and of itself, provide a cause of action in United States courts. Most members would agree that nothing in the Covenant generally, or article 2 in particular, required States parties to make it self-executing under their domestic law, and several other States parties did not do so. In fact, in article 2, paragraph 2, it was specifically contemplated that the Covenant could be implemented through legislation, rather than directly, and that existing legislation would be relied on as far as possible. The real question was not whether the Covenant should be self-executing, but whether the rights accepted by the United States in adhering to the Covenant were, in fact, guaranteed to people within the United States, and whether there was effective recourse and remedies in the event that those rights were violated. If it should be determined that United States law fell short of Covenant standards, then the necessity of corrective legislation would certainly be considered.

8. To clarify an apparent misunderstanding, the courts could refer to the Covenant and take guidance from it even though it was not self-executing. What the Covenant could not do was provide a cause of action. The United States had not declared the Covenant self-executing because it was not necessary to do so in order to satisfy its international obligations thereunder. Although the distinction between self-executing and non-self-executing treaties was of judicial origin, it was entirely appropriate for the President to propose such a declaration and for the Senate to condition its advice and consent to ratification on that basis. When the issue was tested in court, the views of the executive and legislative branches would be entitled to great deference.

9. In reply to Mr. El-Shafei, he said that the criteria for determining that the treaty was non-self-executing were derived from an early Supreme Court decision. The doctrine had since evolved to the effect that multilateral treaties should not readily be held self-executing.

10. The fifth understanding, relating to federalism, was not a reservation and did not exempt the United States from ensuring that state as well as federal law was in conformity with Covenant obligations. Rather, it concerned the steps to be taken domestically by the respective state and federal authorities to give effect to those obligations. Although, as Mr. El-Shafei had noted, some legal scholars had considered that understanding unnecessary, it seemed that they had not taken into account the strongly held views of members of Congress with regard to the effect of treaties on the respective responsibilities of the states and the federal Government. Currently, there were no federal inhibitions to state implementation: federal law provided a common standard of respect for fundamental civil and political rights applicable throughout the country. The federal Government had limited and delegated powers; those not delegated to the federal Government were reserved to the states and the people under the Tenth Amendment to the Constitution. The federal Government could not dictate the basic form or internal workings of state government, but it could establish and enforce uniform standards for the respect of civil and political rights, which could include direct invalidation of any offending laws at the state level. The state attorneys-general had been informed of the ratification of the Covenant and asked to review state laws to ensure that they were in conformity. None had informed the Justice Department of any deficiency. Traditionally, the states did not have a direct role in treaty negotiation or ratification, their interests being represented in the Senate's role in giving advice and consent.

11. The first understanding, concerning equal protection and protection against discrimination, had been drafted with general comment No. 18 in mind. It was difficult to conceive that a governmental objective could be legitimate under United States law if it contravened the fundamental civil and political rights which were protected by the Covenant. With regard to the second understanding, concerning compensation, few, if any, systems of domestic law provided an unqualified right to compensation in all circumstances involving unlawful arrest or detention or miscarriage of justice. Furthermore, the Covenant contained no definition of those terms, nor any authoritative interpretation of them in practice. The Government had, therefore, felt it prudent to state its understanding of the proper reading of those articles on the record. With regard to the fourth understanding, United States law recognized the double jeopardy principle. The purpose of the understanding was to note that, in

certain circumstances, subsequent prosecution by a separate sovereign was permissible, which was the general rule under customary international law and under United States domestic law.

12. Turning to the issue of the death penalty, he said that the decision to retain it reflected a serious and considered democratic choice of the American public. Elected officials were keenly aware of the views of their constituents on that issue and it was not appropriate in that democratic system to dismiss considered public opinion and impose by fiat a different view. It was important to note, moreover, that the Covenant clearly did not prohibit the death penalty; on the contrary, article 6 expressly contemplated that States might impose that penalty, but provided a number of requirements for when it could be imposed, which the United States fully accepted. The sometimes lengthy delay between conviction and punishment was due in large part to the extensive possibilities of seeking review and enforcement of constitutional guarantees of the right of appeal. The reference to future laws in the reservation clarified the fact that the possibility of imposing the death penalty was not limited to the precise laws existing at the time the Covenant was ratified, but could cover laws or amendments enacted in the future by which the penalty was imposed. It was not aimed specifically at types of punishments, but rather at particular types of crimes.

13. On the issue of the juvenile death penalty, he assured the Committee that the matter was being debated and that changes had not been ruled out. Nevertheless, United States laws currently favoured applying the death penalty in limited cases. A large majority of states permitted juveniles to be tried as adults in grave cases involving capital offences at the age of either 16 or 17. While it was legally possible to impose a higher limit at the federal level, it was a question of democratic decision-making and not legal possibilities.

14. It was generally accepted that children below a certain age should not suffer the death penalty no matter how terrible the crime. In the United States that age had been set at 16. The United States disagreed that customary international law established a clear prohibition at the age of 18. The only authority cited was the Convention on the Rights of the Child, which adopted 18 as the age of majority for all purposes, not specifically for the criminal area. Furthermore, widespread adherence to a treaty did not create customary international law. That was especially true for the Convention on the Rights of the Child, a major purpose of which was to create new obligations not already provided for by existing law. It was a matter of record that the drafters of the Convention actually intended to permit a reservation to that provision, as stated in documents E/CN.4/1986/39 and E/CN.4/1989/48.

15. The United States had also explained in its analysis of general comment No. 24 that there was no basis in international law for the view that a reservation could not be made to a provision of a treaty which reflected customary international law. The theory that no reservation could be taken to a non-derogable right, while popular, was also an innovative view and did not reflect existing law.

16. Responding to Mr. Ando's concern about religious education and public funding of schools which were affiliated to religious organizations, he reminded

the Committee of the strong historical and constitutional commitment in the United States to the separation of Church and State. Because of that principle, the Government could not and did not attempt to strengthen religious education in the public schools as Mr. Ando had suggested. However, there was growing concern in American society as a whole to support the development of strong family values as one important method of combating societal ills. Mr. Ando had also noted with regard to paragraph 570 of the initial report that federal funding was more readily available to religiously affiliated institutions of higher learning than to institutions of secondary education. The United States Supreme Court had given two reasons for upholding the constitutionality of that policy. First, college students were less impressionable and less susceptible than younger children to religious indoctrination, and second, church-related institutions of higher learning tended to be less religious than their counterparts at the elementary and secondary levels.

17. Regarding Mr. Ando's inquiry about judicial review in cases where an individual had been denied a passport, he stated that the revocation or denial of passports were matters that were fully subject to such review. A procedure for independent administrative review, described in paragraph 307 of the report, had also been established.

18. On the issue of organized labour, he said that federal, state and local government employees generally had the right to organize and bargain collectively. Federal employees were prohibited from participating in strikes. Similarly, strikes or work stoppages by state and local government employees were generally prohibited by statute or judicial decision. They did, of course, have other effective means for resolving grievances or disputes. Regarding United States participation in the International Labour Organization (ILO), he explained that the United States had always strongly supported the machinery designed to promote freedom of association which had been implemented by that organization, and it had always cooperated fully with ILO whenever complaints had been filed against the United States by either American or international labour organizations. In such cases, the Committee on Freedom of Association had found United States law and practice to be generally in conformity with the broad principle of freedom of association enshrined in the ILO Constitution. No freedom of association complaints were currently pending against the United States Government.

19. Responding to Mr. Lallah's question concerning political opinion as a ground for non-discrimination in employment, he said that the United States was currently considering ILO Convention No. 111, which included such a provision, with respect to its compatibility with domestic law. One potential obstacle to enforcement of such a prohibition against private employers would be the First Amendment. Naturally, because of the protections of the First Amendment, political opinion or orientation was rarely a prerequisite for employment, at least in the private sector.

20. Mr. Klein had asked whether the United States took the view that the Covenant did not apply to government actions outside the United States. The Covenant was not regarded as having extraterritorial application. In general, where the scope of application of a treaty was not specified, it was presumed to apply only within a party's territory. Article 2 of the Covenant expressly

stated that each State party undertook to respect and ensure the rights recognized "to all individuals within its territory and subject to its jurisdiction". That dual requirement restricted the scope of the Covenant to persons under United States jurisdiction and within United States territory. During the negotiating history, the words "within its territory" had been debated and were added by vote, with the clear understanding that such wording would limit the obligations to within a Party's territory.

21. With reference to Mr. Prado Vallejo's questions about the Cuban trade embargo, he rejected the suggestion that the right to self-determination made it necessary for two countries to have trade relations. The Cuban people did not enjoy the right to self-determination, because they lived in one of the world's few remaining totalitarian regimes.

22. Mr. PATRICK (United States of America), referring to questions asked on the subject of voter registration and participation in elections, said that although registration was largely left to the individual states, the Government was committed to eliminating all unfair barriers. The Voting Rights Act of 1965 had removed a number of them, including literacy tests; and the Government would not tolerate intimidation or other impediments to voting freedom. The National Voter Registration Act, introduced in 1993, was intended to make it easier to register; people were encouraged to do so when applying for driving licences or conducting other business at the offices of governmental agencies. Considerable improvements were being achieved in the number of people registering to vote. Also, areas with significant minority language communities were increasingly providing election information in the languages concerned.

23. In reply to a question regarding cases in which electoral districts had been redrawn in such a way as to improve the representation of minorities, he said that the Government believed that such measures were desirable, although their constitutionality had been questioned. As to the voting status of residents of the District of Columbia, they were entitled to vote in elections for President and Vice-President, and they elected their own mayor and other local representatives; there was also a non-voting delegate for the District of Columbia to the House of Representatives.

24. Referring to a question on language rights, he said that linguistic minorities were entitled to equal protection under the law, and were protected from discrimination. Over 30 million United States citizens spoke a language other than English in their homes. English-only rules were prohibited in the workplace unless the employer could show that such a rule was justified by a business necessity. Students who were speakers of minority languages were entitled to equal benefits in federally assisted school systems, and educational agencies were required to overcome language barriers that prevented equal participation in educational programmes. The United States was committed to making education accessible to all students regardless of their proficiency in English; millions of dollars were spent each year on bilingual education services.

25. Referring to questions regarding the treatment of women in prison, he said that sexual abuse in prison was a violation of federal criminal statutes; several allegations of abuse and invasion of privacy had been investigated by

the Civil Rights Division of the Department of Justice. The Government's efforts to protect prisoners from unnecessary force and arbitrary physical abuse took three forms: training, administrative sanctions, and criminal prosecutions. There was also a well-established scheme for punishing federal prison personnel who abused inmates. In order to protect the privacy of female inmates, only female officers were permitted to conduct strip searches or body cavity searches, except in emergency situations; and male officers were admonished to respect the privacy of female inmates.

26. A member of the Committee had expressed concern about special maximum-security prison conditions. A very limited number of the prison population (about 0.4 per cent) were held under such conditions, which were intended for extremely violent inmates.

27. It was expected that the 1994 Crime Bill would lead to an increase in the prison population; the Government planned to spend several billion dollars on new prison construction. As for the proposal of one prison commissioner to reinstitute chain gangs, the Justice Department would look into the matter very closely if the proposal was, in fact, accepted.

28. Whenever conditions of incarceration violated constitutional standards, several forms of recourse were available to inmates. In addition to prison grievance systems, there were a number of state and federal mechanisms. Over the past 15 years, the Department of Justice had taken action to improve conditions in more than 60 jails throughout the United States.

29. Referring to questions regarding scientific experimentation, he said that the Justice Department had the authority to investigate non-consensual medical experimentation on institutionalized persons. The Department had conducted numerous investigations and lawsuits of institutions for the mentally retarded and for the mentally ill, but had in no case discovered evidence of systematic abusive practices. The newspaper article which had been referred to by a member of the Committee concerned individuals who had been medicated with the consent of their relatives or guardians.

30. Additional information had been requested regarding the use of drugs in experimental research, referred to in paragraph 179 of the report. Informed consent was required in all cases except life-threatening situations, and there was a requirement in all cases for a preliminary determination by the Food and Drug Administration that the drug was sufficiently safe for testing on humans. In addition, there had to be a therapeutic purpose. Otherwise, the testing of experimental drugs on humans was not permitted, irrespective of federal funding.

31. Referring to expressions of concern by members of the Committee on the subject of the initiative in California known as Proposition 187, he said that the federal Government shared that concern. The initiative had raised objections in many quarters, and was being challenged by a coalition of advocacy groups on a number of constitutional grounds. Pending the resolution of legal challenges, the measure was not being implemented.

32. A member of the Committee had expressed concern about the status of children born out of wedlock. The Supreme Court had held that punishing parents

by imposing disadvantages on such children was contrary to the basic concept of individual responsibility; being born out of wedlock was a situation out of the control of the child, and he or she should not be punished for it.

33. With reference to questions regarding segregation in education, the constitution and laws of the United States prohibited any action to separate students on the basis of race, and no entity receiving public funds could provide inferior educational resources or otherwise treat students differently on such a basis. Accordingly, the Department of Justice was engaged in litigation, negotiations and monitoring in hundreds of school districts across the country to eliminate the vestiges of segregation. It was, however, necessary to distinguish between racial patterns that resulted from the actions of public authorities and those that were the result of individual choices about where to live. The Civil Rights Division was also responsible for enforcing laws preventing discrimination in housing.

34. Affirmative action in favour of women and minorities had existed for about 25 years in the areas of education, employment and government contracting. Private industry and universities were engaged voluntarily in similar measures. The Supreme Court had permitted such efforts as long as they were flexible, did not sacrifice merit and did not unfairly divest whites of vested rights. The courts had supported legitimate uses of affirmative action as one mechanism to promote opportunities for previously excluded citizens.

35. A review of government programmes relating to affirmative action was under way, but he emphasized that there would be no retreat from the Government's commitment to the goal of expanding opportunity for all United States citizens in education, employment and the economy generally. As long as some barriers, and the effects of previous ones, remained for minorities and women, the Government would remain vigilant in enforcement of anti-discrimination laws.

36. In reply to a question regarding sexual discrimination, he said that the Constitution provided that no person could be denied the equal protection of the laws based on gender or race. Although there were differences between men and women that could in rare cases justify differential treatment, the Supreme Court rarely upheld distinctions based solely on sex, and would not uphold a distinction denying women any of the fundamental rights guaranteed by the Covenant. The Civil Rights Division was involved in enforcement of several statutes specifically protecting the rights of women and outlawing discrimination in housing, education, equal access to credit, and employment.

37. Referring to questions relating to discrimination on the basis of sexual orientation and the right of privacy for sexual minorities, he said that such minorities were entitled under the United States Constitution to equal protection of the laws, and there were state and local laws which included sexual orientation as a protected category. It was highly unusual for any state to prosecute anyone for private, consensual sexual activity.

38. Responding to a request for clarification of the term "legitimate governmental objective" in reviewing a classification for constitutional validity, he said the Supreme Court had recognized that the great majority of government classifications in laws drew distinctions among groups of persons

that did not discriminate against any person or group, but rather promoted legitimate government interest in efficiency, addressing particular public problems, and accommodating competing needs. Invidious discrimination based on status, or a desire to harm a politically unpopular group was never a legitimate governmental objective.

39. A number of members had asked whether hate speech could be equated with obscenity, such that it would receive no protection under the First Amendment to the Constitution. The Supreme Court had declared that hate speech, although offensive, was protected by the First Amendment unless accompanied by certain violent actions. Racist words alone did not constitute a hate crime. The Department of Justice vigorously prosecuted acts of racial violence and cases involving threats to take violent action against racial minorities.

40. Replying to various other questions which had been raised by members of the Committee, he said that many statutes, as well as the Constitution, contained safeguards protecting the right of free association. Regarding "police brutality", there were criminal and civil statutes to remedy such violations, and over 100 cases involving the use of excessive force had been prosecuted; the Department of Justice also worked to prevent such abuses through training, lectures and seminars. Victims could also sue for compensatory and punitive monetary damages. Regarding sanctions against parties to a court case under the Federal Rules of Civil Procedure, the rules had been amended in 1993, allowing for opportunities to exist to cure any defect or argument before a motion for sanction could be allowed.

41. Ms. HARRIS (United States of America), responding to questions raised by Mr. Ando and Mr. Mavrommatis, said that the United States did not believe that the Covenant required a ban on firearms. The problem of firearms in the United States was addressed by a number of laws adopted by the Congress and by state and local legislation. Federal legislation, in addition to the Brady Bill and Assault Weapons Ban, was contained in Title 18 of the United States Criminal Code. Section 922 (a) of the Code prohibited interstate transactions in firearms except by federally licensed dealers. Section 922 (b) prohibited the sale of handguns to minors. Section 92 (g) prohibited convicted felons, persons under indictment for a crime, fugitives from justice and other classes of individuals from possessing firearms. Section 922 (o) prohibited the transfer or possession of newly made machine-guns. Section 922 (p) prohibited the manufacture, import, sale, shipment, delivery, possession, transfer or receipt of any firearm that was not detectable by a metal detector. Section 922 (q) prohibited the possession of a firearm in a school zone. Section 992 (x), a fairly new provision, prohibited the possession of handguns by juveniles. Section 924 (d) enhanced the penalties for the use of firearms in violent crimes or crimes related to drug trafficking. Section 924 (e) enhanced the penalties for repeat violent offenders who possessed a firearm at the time of arrest.

42. Responding to Mr. Lallah's question, she said that alternate jurors were selected at the same time as the regular panel of jurors. The alternates heard the evidence along with the other jurors in case they had to replace a regular juror. The number of alternate jurors and other details concerning their selection and service during the trial were determined under Federal Rule of Criminal Procedure 24 (c). The states applied similar rules.

43. Replying to a question asked by Mr. Francis, she said that an initial investigation had not confirmed that prisoners had been denied access to television or radio by a trial judge. As a general rule, however, trial judges did not determine conditions of imprisonment. At the state level, such conditions were determined by the Department of Correction in line with legitimate penal objectives.

44. In response to Mr. Ando's query concerning paragraph 525 of the initial report, she said that a judicial officer was defined as a judge, a magistrate judge or someone who was both neutral and detached and could make a probable cause determination. In response to another question raised by Mr. Ando concerning paragraph 518 of the report, she said that the issuing official was considered to be "neutral and detached" if he or she was not connected to the law enforcement authorities or involved in the investigation. In two cases, the Supreme Court had held that warrants were invalid - in Coolidge v. New Hampshire (1971), where the warrant had been issued by a state attorney-general acting as a magistrate who was also in charge of the investigation and the prosecution, and in Lo-Ji, Sales, Inc. v. New York (1979), where the warrant had been issued by a town justice who then participated in a search he had authorized.

45. Mr. DI GREGORY (United States of America) drew attention to a Bureau of Justice Statistics Bulletin entitled Capital Punishment 1993. The report, published in December 1994, contained statistics on both adults and juveniles. It did not include a statistic requested by Mr. Bhagwati - namely, that 36 persons under the age of 18 at the time of arrest had been sentenced to death. Two, both of whom had been 17 years of age at the time they had committed the offence, had been executed. Replying to Mr. Mavrommatis, he said that 31 of the 38 states with death penalty statutes imposed capital punishment only for murder and other serious crimes, including aggravated homicide. Seven states had extended the death penalty to certain serious non-homicidal crimes which involved grave risk of death to others or to society. Those crimes included treason, train-wrecking, aircraft hijacking, aggravated kidnapping and forcible rape of a child.

46. Replying to a question raised by Mr. Francis, he reiterated that the United States did not accept the concept of the "death row phenomenon" advanced by the European Court of Human Rights. On the contrary, it recognized that a prisoner might spend years in prison before the execution of the death sentence. The delay enabled defence lawyers to pursue every possible avenue of appeal and review. Most defendants had been tried in state courts and were eligible to appeal their sentences and convictions to the appellate court of the state in which they had been tried. In addition to those direct appeals, they could indirectly challenge their convictions by arguing that they had received ineffective assistance or counsel during the trial. They also had a limited right to have their convictions reviewed by the federal courts. While the appellate process was time-consuming, it was deemed to be an important safeguard in the American legal system.

47. Replying to Mr. Lallah's question concerning the appointment of competent counsel in cases of capital punishment, he said that defendants were entitled to be represented; counsel would be appointed if a defendant could not afford to engage someone. In the federal courts, defendants accused of capital crimes,

regardless of whether they were indigent, had the right to be represented by two lawyers. Where lawyers were court-appointed, one was generally experienced in capital cases. The current Administration and the Department of Justice were promoting legislation to ensure that defendants accused of capital crimes in the state courts were represented by experienced and competent counsel.

48. Concerning Mr. Mavrommatis's question about approximately 60 new grounds for capital punishment contained in the Violent Crime Control and Law Enforcement Act of 1994, he said that constitutional and federal statutes limited the death penalty to the most egregious crimes that posed an extremely grave risk to society. Generally, capital punishment was imposed for the most aggravated offences involving murder. It was applicable if the defendant had intentionally killed the victim, inflicted serious bodily injury that resulted in death, participated in an act knowing that death would result or had participated in an act of violence with reckless disregard for human life which had resulted in death. Federal law also authorized the death penalty for non-homicidal offences which caused serious harm to the nation, including espionage and treason. Drug kingpins who trafficked in extremely large quantities and whose profits were twice the amount of those punishable by life imprisonment and drug kingpins who attempted to murder or order the murder of public officers, jurors, witnesses or their families in order to obstruct justice were also subject to the death penalty.

49. In 1994, the United States Congress had enacted legislation establishing constitutional procedures for the imposition of the death penalty under federal law where it had already existed under 15 particular statutes. It had established 29 new capital statutes for a combined total of approximately 60 offences. Fifty-six of those crimes involved aggravated homicide resulting from violent crimes, such as kidnapping, child sexual abuse and terrorist acts. Four of them involved non-homicidal offences which caused grave harm to the nation.

50. Responding to Mr. Lallah's question about methods of execution, he said that, under the United States Constitution, no sentence, including a death sentence, could be carried out in an inhumane or barbaric manner. The five methods of execution currently employed by states which had death penalty statutes included lethal injection, electrocution, lethal gas, hanging and firing squads. Hanging and firing squads were being phased out, however, and the trend nationally was towards lethal injection.

51. Responding to a question raised by Mr. Mavrommatis and Mr. Lallah, he said that a number of states did not have laws which affirmatively expressed a prohibition against the execution of pregnant women. With the adoption of the recently enacted Violent Crime Control and Law Enforcement Act of 1994, the United States Congress had expressly prohibited the execution of pregnant women (United States Criminal Code, Title 18, section 3596 (b)). The lack of affirmative laws in no way suggested that a death sentence would be even theoretically contemplated in such circumstances. The delegation appreciated the Committee's concern but believed that the issue did not pose a problem.

52. Responding to Mr. Bruni Celli and other Committee members who had inquired about the period 1972-1976, when the death penalty had been temporarily halted by the Supreme Court, he said that the United States Supreme Court had never

held the death penalty to be unconstitutional. In 1972, the Supreme Court had held that existing death penalty sentencing procedures did not meet the constitutional requirements for reliability and individual consideration. It had not, however, held that the death penalty in and of itself was unconstitutional. In 1976, the Supreme Court had upheld revised sentencing procedures established by the State of Georgia, which required consideration of specific aggravating factors imposing the death penalty, and of relevant mitigating factors that ensured individual treatment of each defendant. Sentencing procedures in other states which provided similar guidance to the sentencing authority had also been found to be constitutional. In the 1976 decision upholding the revised procedures, three of the Supreme Court justices had cited two centuries of precedent recognizing that capital punishment was not invalid.

53. Replying to questions raised by Mrs. Medina Quiroga and Mrs. Higgins concerning racial discrimination and capital punishment, he said that United States law expressly prohibited the imposition of the death penalty on the basis of race and required that each capital case should be considered on an individual basis. He read out Title 18, section 3592 (f) of the Federal Criminal Code, which required a jury deliberating a death sentence to be instructed not to consider the race, colour, religious beliefs, national origin or sex of the defendant or of any victim and not to recommend a sentence of death unless it would have recommended that sentence for the crime in question regardless of such criteria. In returning its findings, the jury was also required to submit a certificate signed by each juror declaring that his or her decision was not based on discriminatory criteria and that he or she would have made the same recommendation regardless of the race, colour, religious beliefs, national origin or sex of the defendant or victim.

54. Replying to Mrs. Higgins's question, he said that the Racial Justice Act contained two key provisions. The first prohibited the execution of any person under state or federal law if the sentence had been imposed on the basis of race; the second provided that an inference that a death sentence had been imposed on the basis of race could be established if there was valid evidence demonstrating that race had been a statistically significant factor in the decision, at either the state or federal level. The United States House of Representatives had adopted the Racial Justice Act as part of comprehensive anti-crime legislation referred to as the Crime Bill of 1994. The Senate had adopted a version of the Crime Bill which did not include the Racial Justice Act. The Supreme Court had held that, for purposes of constitutional analysis, statistical evidence of racial discrimination was not sufficient to support an inference of an unacceptable risk of racial discrimination in the imposition of the death sentence. Its reasoning was that the capacity of prosecutorial discretion to guarantee individualized justice was firmly entrenched in United States law. Leniency could also be considered a form of discrimination; however, ruling out leniency was alien to the United States system of justice.

55. In an effort to ensure that capital punishment imposed by federal courts would be handled in a fair and consistent manner, in early 1995 the United States Attorney-General had established a process for the review of each case by the Attorney-General in the light of any mitigating factors, including evidence of racial bias against the defendant or evidence of discrimination by the

Department of Justice. Prior to the establishment of that procedure, three United States district courts had thoroughly reviewed the files of the Department of Justice on all death penalty cases, most recently in May 1994. Each of the three courts had found no indication of racial bias in decisions to impose a sentence of capital punishment. One court had stated that, if anything, the criteria, policies and procedures of the Department of Justice demonstrated a heightened concern to ensure that the death penalty was not unfairly imposed on grounds of race or ethnic origin.

56. In response to concerns expressed by a number of Committee members concerning juveniles between 16 and 18 years of age, he said that federal statutes prohibited the execution of persons who had been under 18 years of age at the time they committed a capital crime. Those statutory provisions exceeded the requirements of the Constitution, which prohibited capital punishment if persons were 16 years of age at the time the crime had been committed. The Constitution required that, regardless of age, the relative youth or immaturity of a defendant must be considered if raised in mitigation. Addressing Mr. Bhagwati's concern about the execution of mentally retarded persons, he said that federal statute prohibited the execution of persons who were mentally retarded or disabled to a degree which prevented them from understanding the nature of the proceedings against them, the nature of the punishment and the reason for its imposition. The Constitution also required that evidence of mental retardation or mental illness must always be considered if offered in mitigation, regardless of the degree of such condition. Concerning Mr. Bhagwati's question about the number of mentally retarded persons executed since 1972, he said that the Bureau of Justice did not maintain statistics on the mental capacity of persons sentenced to death.

57. Mr. ALEINIKOFF (United States of America), replying to a question raised by Mr. Ando, said that the United States had acceded to the 1967 Protocol relating to the Status of Refugees, worked closely with the United Nations High Commissioner for Refugees (UNHCR) and was a member of the UNHCR Executive Committee. It helped to resettle over 100,000 refugees annually through its overseas refugee programme. While there was no formal review procedure for refugee status determinations made overseas, unsuccessful applicants could request the Immigration and Naturalization Service to reconsider its determinations or hear new evidence.

58. The Office of the Immigration Judge received claims for refugee protection from persons within the United States. Its judges were administrative officials who were part of the Department of Justice. Their decisions on deportability and relief from deportation were reviewable by a specialized administrative appeal board.

59. In response to questions raised by Mr. Prado Vallejo and Mr. Klein, he said that the United States did not construe the Covenant as imposing obligations on a State party outside of its territory. However, in its safe haven programme for Cubans and Haitians in Guantanamo Bay, Cuba, the United States had made every effort to create humanitarian conditions in Guantanamo, including the provision of shelter, schools, Creole- and Spanish-language newspapers and radio, access to telephones, a specially created mail service, and expert medical care.

60. Replying to Mr. Kretzmer's question concerning excludable aliens, he said that the Supreme Court considered due process for excludable aliens to be such process as Congress provided. The immigration statute provided for proceedings before an immigration judge in order to determine excludability, the opportunity to apply for asylum or other relief and an administrative review process. Excludable aliens also had the right to seek habeas corpus review in the federal courts under the normal procedure for the review of agency action.

61. The statute provided for the detention of aliens who did not appear to be admissible. Accordingly, some aliens were detained while their exclusion proceedings were in progress or pending a final order for their release. In practice, however, most aliens who appeared to be excludable were not detained. Special procedures were in place to ensure that aliens who remained in detention received expedited consideration in the immigration courts. The Immigration and Naturalization Service did not maintain statistics on the number of aliens who appeared to be excludable and were detained. The average length of detention in 1994 for both exclusion and deportation cases was 26 days. That period was longer for those who pursued appeals or, in rare cases, where removal upon a final order was delayed. Aliens could seek parole where their continued detention was not in the public interest or other circumstances warranted release. Parole decisions were reviewable in federal court.

62. Responding to another question asked by Mr. Prado Vallejo concerning the "Mariel Cubans", he said that, in 1980, approximately 125,000 Cubans had entered the United States through irregular channels. Most had been initially detained but later released. Approximately 2,000 to 3,000 persons suspected of having had criminal records in Cuba had been initially detained. Of that group, only two persons had remained in custody since their arrival in 1980 because of psychiatric and other medical problems. Currently, about 1,400 other Mariel Cubans were in the custody of the Immigration and Naturalization Service or the Bureau of Prisons. All of them had been convicted of serious crimes after being admitted to the United States. At the conclusion of their prison sentences, the Immigration and Naturalization Service had revoked their parole; they remained in custody pending their return to Cuba. The cases of each Mariel Cuban in detention were reviewed annually by the Service; about half of the detainees were released once it was determined that they would not pose a danger to the community.

63. Replying to Mr. Kretzmer's inquiry about Haitians interdicted on the high seas, he said that the United States had worked with UNHCR to open a safe haven for Haitians at Guantanamo Bay in 1994. The standard for granting safe haven was much lower than the refugee standard. With the restoration of democracy in Haiti, most Haitians in Guantanamo had returned to Haiti of their own accord. Before ending the safe haven programme, the United States had interviewed all those who still considered repatriation unsafe. On the basis of those interviews, a small number of Haitians remained in safe haven in Guantanamo.

64. Replying to a constitutional issue raised by Mr. Bhagwati concerning legal representation for the poor, he said that indigent criminal defendants had a constitutionally protected right to court-appointed counsel; states and localities provided that service through Public Defender Offices. In addition, the Legal Services Corporation offered legal representation to the poor and fee-

shifting statutes provided for funding for counsel for the poor. The Equal Access to Justice Act awarded attorney fees to private parties who, in certain circumstances, prevailed in litigation against the United States. Under another federal fee-shifting statute, attorney fees were awarded to successful plaintiffs in certain civil rights actions against the states. In addition, many attorneys, encouraged by professional associations and law firms, assisted the poor without compensation. In law school clinics, law students represented poor clients under the supervision of an experienced attorney. Legal representation was also offered by a wide network of voluntary agencies and social service organizations.

65. Concerning the use of corporal punishment on children, the United States had entered a reservation to article 7 of the Covenant and considered itself bound by that article only to the extent that the protections it provided were consistent with the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. Corporal punishment of children was rare; however, the United States Supreme Court had expressly held that it could be used on children under certain circumstances in conformity with the Eighth Amendment on cruel and unusual punishment. When the use of corporal punishment by public institutions exceeded constitutional limits, private legal action could be brought under federal statutes against state officials. If the lawsuit was successful, the plaintiff's attorney fees must be paid by the defendant.

66. Replying to a question concerning the provision of compensation to the subjects of radiation experiments conducted in the 1940s, he stressed that the United States Government had taken the initiative in disclosing those experiments and considering means of redress for the subjects. In December 1993, the Secretary of the Department of Energy had confirmed that individuals had been subjected to injections of plutonium as part of an experiment conducted by the Atomic Energy Commission in the 1940s and the Department had begun investigating the nature and extent of experiments involving intentional human exposure to radiation. Since April 1984, the investigations had been conducted by the Presidential Advisory Committee on Human Radiation Experiments, which held monthly public meetings. At the same time, a federal inter-agency working group had outlined elements of an appropriate response to the victims, including informing the subjects and their families of potential health risks and the need for medical follow-up, apologies, ongoing research, education and information programmes and monetary compensation. The final report of the Advisory Committee would be issued in May 1995.

67. Ms. HOMER (United States of America) noted that Mr. Klein had asked whether the fact that American Indians were discussed under article 1 of the Covenant meant that tribes possessed the right to self-determination under international law. As Mrs. Higgins had noted, the way in which the issue had been positioned in the text was not meant to reflect a legal conclusion. Mr. Klein had correctly noted that the concept of sovereignty as applied to tribes was not the same concept as the sovereignty of States under international law.

68. In response to Mrs. Higgins's questions, she said that in order to understand the concept of "tribal self-determination" under United States law, it was necessary to bear in mind special historical considerations concerning

the Indian tribes. Prior to the establishment of the United States, the European nations had engaged in trade and conducted relations with the tribes on a nation-to-nation basis. That mode of intercourse had been continued by the United States which, in article 1, section 8, of the Constitution, vested the federal Government with the authority to engage in relations with the tribes. In the 1830s Chief Justice John Marshall had articulated the fundamental legal principle which had guided the evolution of federal Indian law ever since, namely, that Indian tribes possessed a nationhood status and retained inherent powers of self-government. Thus, in the context of federal Indian law, tribal self-determination meant that tribes had the right to operate under their own governmental systems within the American political framework.

69. The Government's relationships with other indigenous peoples under its jurisdiction differed from that of the federal Indian relationship. There was no constitutional language referring to other indigenous groups, and hence the law had followed another course. Nevertheless it had been the policy of the United States during recent decades to support the rights of the territories to represent their own interests. With specific reference to Puerto Rico, decisions on when to conduct plebiscites on the island's territorial status had been left entirely to the local population. Regarding Hawaii, federal courts had ruled that the term "Hawaiian native" denoted ethnic origin and not political status, and thus the United States had never established a government-to-government relationship with peoples of native Hawaiian descent. The same applied to the native inhabitants of United States insular areas, all of which had been acquired by virtue of treaties with other States. The local governments of the insular areas were not examples of retained, unextinguished sovereignties. They were elected by the entire local populace, which in most instances included individuals who did not qualify as descendants from a native group.

70. Mr. Klein and Mrs. Higgins had asked about the implications of the fact that Congress could recognize or extinguish a tribe. In the context of federal Indian law, congressional actions with regard to Indians were not without constitutional limitations; they were also subject to judicial review. Indians were citizens of the United States and as such received the same constitutional protections as other citizens. Furthermore, the Fifth Amendment to the Constitution prohibited uncompensated government appropriation of Indian lands and equitable remedies were available to tribes and individuals. The Supreme Court had ruled that the constitutional standard for judicial review was whether the disputed legislation was rationally connected to the fulfilment of Congress's unique obligations to the Indian nations.

71. Those unique obligations were referred to as the Federal Indian Trust responsibility, a legal obligation under which the United States had charged itself with moral obligations of the highest responsibility and trust towards Indian tribes. It was one of the most important principles in federal Indian law. Its scope was evolving, but it basically entailed a legally enforceable fiduciary obligation on the part of the United States to protect tribal land, assets, resources and treaty rights as well as a duty to carry out the mandates of federal law with respect to Indian tribes. In several cases discussing the trust responsibility, the Supreme Court had used language suggesting that it entailed legal duties, moral obligations, and the fulfilment of understandings

and expectations that had arisen over the entire course of dealings between the United States and the tribes.

72. In answer to Mrs. Higgins's question about the limits of tribal self-identification, it was important to clarify that the relationship between the tribes and the United States was a political one. Tribes were "federally recognized" and existed politically in what was termed a "domestic dependent nation status". Federally recognized tribes possessed certain inherent rights of self-government and were also entitled to certain federal benefits, services and protections because of the special trust relationship. Congress had directed the Secretary of the Interior to publish a list of such tribes every year. Non-federally recognized groups could challenge their exclusion from the list and petition for acknowledgement, as described in paragraphs 52 and 53 of the report. If a petitioning group were to be denied recognition, it could seek redress by filing a suit in federal court, or alternatively it could seek legislative relief in Congress. Success in either instance would result in "judicially determined" or "legislatively determined" federal recognition, and a tribe recognized in either way could only be terminated by Congress.

73. With reference to the current socio-economic status of American Indians and Alaska natives, she emphasized that under self-determination policies tribes had become increasingly involved in providing educational services and health care, and substantial improvements had been noted in both those areas. Tribes were also working hard to develop diversified economies and self-sufficiency. Gaming, tourism, energy production, precious metals production, forestry, fisheries, transportation, retail and wholesale sales, ranching, manufacturing and agriculture were just some of the economic activities in which the tribes were involved.

74. She presented an overview of various legislative measures designed to protect the subsistence lifestyle of the Alaska natives and to accommodate American Indian religious, cultural and language needs such as the American Indian Religious Freedom Act, the Native American Graves Protection and Repatriation Act, the Native American Languages Act and the Indian Arts and Crafts Act.

75. Finally, she indicated that while economic conditions had improved for American Indians during recent years, indigenous communities continued to lag behind the rest of the nation with respect to social, economic and educational attainment levels. Income levels among American Indians and Alaska natives were substantially below those of all other Americans, and some 31 per cent continued to live below the poverty level compared to a 13 per cent poverty level nationwide.

The meeting rose at 12.55 p.m.